

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
JAN - 3 2011	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ANTHONY LEWIS  
#96337

Plaintiff,

vs.

A. STANKUS, *et al.*,

Defendants.

3:10-cv-00497-ECR-VPC

**ORDER**

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's application to proceed *in forma pauperis* is granted (docket #12). Plaintiff also filed a motion for appointment of counsel (docket #6).

**I. Plaintiff's Motion for Appointment of Counsel**

Plaintiff has filed a motion seeking the appointment of counsel in this case (docket #6). A litigant in a civil rights action does not have a Sixth Amendment right to appointed counsel. *Storseth v. Spellman*, 654 F.2d 1349, 13253 (9<sup>th</sup> Cir. 1981). In very limited circumstances, federal courts are empowered to request an attorney to represent an indigent civil litigant. The circumstances in which a court will make such a request, however, are exceedingly rare, and the court will make the request under only extraordinary circumstances. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 799-800 (9<sup>th</sup> Cir.

1 1986); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9<sup>th</sup> Cir. 1986).

2 A finding of such exceptional circumstances requires that the court evaluate both the  
3 likelihood of success on the merits and the plaintiff's ability to articulate his claims in *pro se* in light of  
4 the complexity of the legal issues involved. Neither factor is dispositive, and both must be viewed  
5 together in making a finding. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9<sup>th</sup> Cir. 1991)(citing *Wilborn*,  
6 *supra*, 789 F.2d at 1331). The district court has considerable discretion in making these findings.  
7 Plaintiff has demonstrated his ability to articulate his claims, which do not appear to involve complex  
8 legal issues. The court will not enter an order directing the appointment of counsel; plaintiff's motion  
9 is denied.

10 The court now reviews the complaint (docket #1-1).

## 11 **II. Screening Standard**

12 Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a  
13 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"  
14 "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who  
15 is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an  
16 arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,  
17 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or  
18 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a  
19 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
20 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

21 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
22 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
23 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under  
24 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,  
25 232 F.3d 719, 723 (9<sup>th</sup> Cir. 2000). A complaint must contain more than a "formulaic recitation of the  
26 elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief

1 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
 2 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
 3 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,  
 4 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*  
 5 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to  
 6 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).  
 7 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by  
 8 lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per*  
 9 *curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). All or part of  
 10 a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner’s claims lack an  
 11 arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable  
 12 (e.g. claims against defendants who are immune from suit or claims of infringement of a legal interest  
 13 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g. fantastic or  
 14 delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932 F.2d 795, 798  
 15 (9th Cir. 1991).

16 To sustain an action under section 1983, a plaintiff must show (1) that the conduct  
 17 complained of was committed by a person acting under color of state law; and (2) that the conduct  
 18 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676,  
 19 689 (9<sup>th</sup> Cir. 2006).

### 20 **III. Instant Complaint**

21 Plaintiff, who is incarcerated at Lovelock Correctional Center (“LCC”), has sued  
 22 Northern Nevada Correctional Center (“NNCC”) corrections officers Lt. A. Stankus, P. Lessard, and A.  
 23 Luis. Plaintiff alleges the following: on June 18, 2010, Lessard delivered a breakfast tray to plaintiff’s  
 24 cell. Plaintiff then told Luis that the sugar packet for his coffee was empty. Luis took the packet and  
 25 threw it on the floor. Stankus approached and plaintiff told him what happened. Luis then kicked the  
 26 food slot closed on plaintiff’s left hand, Luis and Stankus “rushed the food slot,” squeezing it closed on

1 plaintiff's hand, Stankus beat plaintiff's hand with his flashlight, then Lessard grabbed plaintiff's  
2 swollen fingers and bent them backwards, trying to break them. When plaintiff was seen by medical,  
3 they took photographs and x-rays of his hand and administered a shot. Plaintiff claims that defendants  
4 used excessive force in violation of his Eighth Amendment rights and transferred him to LCC in  
5 retaliation for filing this lawsuit in violation of his First Amendment rights.

6           The Eighth Amendment prohibits the imposition of cruel and unusual punishments and  
7 "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Estelle*  
8 *v. Gamble*, 429 U.S. 97, 102 (1976). "[W]henever prison officials stand accused of using excessive  
9 physical force in violation of the [Eighth Amendment], the core judicial inquiry is . . . whether force was  
10 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause  
11 harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley v. Albers*, 475 U.S. 312, 320-21  
12 (1986); *Watts v. McKinney*, 394 F.3d 710, 711 (9<sup>th</sup> Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184  
13 (9<sup>th</sup> Cir. 2003); *Marquez v. Gutierrez*, 322 F.3d 689, 691-92 (9<sup>th</sup> Cir. 2003); *Clement v. Gomez*, 298 F.3d  
14 898, 903 (9<sup>th</sup> Cir. 2002); *Jeffers v. Gomez*, 267 F.3d 895, 900 (9<sup>th</sup> Cir. 2001) (*per curiam*); *Schwenk v.*  
15 *Hartford*, 204 F.3d 1187, 1196 (9<sup>th</sup> Cir. 2000); *Robins v. Meecham*, 60 F.3d 1436, 1441 (9<sup>th</sup> Cir. 1995);  
16 *Berg v. Kincheloe*, 794 F.2d 457, 460 (9<sup>th</sup> Cir. 1986). When determining whether the force is excessive,  
17 the court should look to the "extent of injury . . . , the need for application of force, the relationship  
18 between that need and the amount of force used, the threat 'reasonably perceived by the responsible  
19 officials,' and 'any efforts made to temper the severity of a forceful response.'" *Hudson*, 503 U.S. at 7  
20 (quoting *Whitley*, 475 U.S. at 321); *see also Martinez*, 323 F.3d at 1184. Although the Supreme Court  
21 has never required a showing that an emergency situation existed, "the absence of an emergency may  
22 be probative of whether the force was indeed inflicted maliciously or sadistically." *Jordan*, 986 F.2d  
23 at 1528 n.7; *see also Jeffers*, 267 F.3d at 913 (deliberate indifference standard applies where there is no  
24 "ongoing prison security measure"); *Johnson v. Lewis*, 217 F.3d 726, 734 (9<sup>th</sup> Cir. 2000). Moreover,  
25 there is no need for a showing of serious injury as a result of the force, but the lack of such injury is  
26 relevant to the inquiry. *See Hudson*, 503 U.S. at 7-9; *Martinez*, 323 F.3d at 1184; *Schwenk*, 204 F.3d

1 at 1196. Plaintiff states an Eighth Amendment excessive force claim against defendants.

2           Allegations of retaliation against a prisoner's First Amendment rights to speech or to  
3 petition the government may support a section 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th  
4 Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989). To establish a *prima*  
5 *facie* case, plaintiff must allege and show that defendants acted to retaliate for his exercise of a protected  
6 activity, and defendants' actions did not serve a legitimate penological purpose. *See Barnett v. Centoni*,  
7 31 F.3d 813, 816 (9th Cir. 1994); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). A plaintiff  
8 asserting a retaliation claim must demonstrate a "but-for" causal nexus between the alleged retaliation  
9 and plaintiff's protected activity (*i.e.*, filing a legal action). *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir.  
10 1979); *see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The prisoner must  
11 submit evidence, either direct or circumstantial, to establish a link between the exercise of constitutional  
12 rights and the allegedly retaliatory action. *Pratt*, 65 F.3d at 806. Timing of the events surrounding the  
13 alleged retaliation may constitute circumstantial evidence of retaliatory intent. *See Soranno's Gasco,*  
14 *Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Plaintiff states a retaliation claim against  
15 defendants.

16           No other claims are stated in this complaint.

#### 17 **IV. Conclusion**

18           **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma*  
19 *pauperis* (docket #12) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be  
20 required to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to  
21 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is  
22 permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or  
23 the giving of security therefor. This order granting *in forma pauperis* status shall not extend to the  
24 issuance of subpoenas at government expense.

25           **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the  
26 Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk

1 of the United States District Court, District of Nevada, 20% of the preceding month's deposits to the  
2 account of Anthony Lewis, **Inmate No. 96337** (in months that the account exceeds \$10.00) until the full  
3 \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order to the attention  
4 of Albert G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011,  
5 Carson City, NV 89702.

6 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise  
7 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the  
8 Prisoner Litigation Reform Act of 1996.

9 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the complaint  
10 (docket #1-1).

11 **IT IS FURTHER ORDERED** that plaintiff's Eighth Amendment claim **MAY**  
12 **PROCEED**.

13 **IT IS FURTHER ORDERED** that plaintiff's retaliation claim **MAY PROCEED**.

14 **IT IS FURTHER ORDERED** as follows:

15 1. The Clerk shall electronically serve a copy of this order, including the attached Notice  
16 of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint, on the Office  
17 of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

18 2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the date  
19 of entry of this order whether it can accept service of process for the named defendants. As to any of  
20 the named defendants for which the Attorney General's Office cannot accept service, the Office shall  
21 file, *under seal*, the last known address(es) of those defendant(s).

22 3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion  
23 identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name and  
24 address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules of  
25 Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the  
26 complaint was filed.

1           4. If the Attorney General accepts service of process for any named defendant(s), such  
2 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**  
3 following the date of the early inmate mediation. If the court declines to mediate this case, an answer  
4 or other response shall be due within **thirty (30) days** following the order declining mediation.

5           5. The parties **SHALL DETACH, COMPLETE, AND FILE** the attached Notice of Intent to  
6 Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

7           **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,  
8 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or  
9 other document submitted for consideration by the court. Plaintiff shall include with the original paper  
10 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed  
11 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff  
12 shall direct service to the individual attorney named in the notice of appearance, at the address stated  
13 therein. The court may disregard any paper received by a district judge or a magistrate judge that has  
14 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

15           **IT IS FURTHER ORDERED** that plaintiff's motion for appointment of counsel (docket  
16 #6) is **DENIED**.

17  
18           DATED this 3rd day of January, 2010.

19  
20           Valerie R. Foster  
21           UNITED STATES MAGISTRATE JUDGE  
22  
23  
24  
25  
26

1  
2  
3  
4 Name \_\_\_\_\_

5 Prison Number \_\_\_\_\_

6 Address \_\_\_\_\_  
7 \_\_\_\_\_

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA

10 \_\_\_\_\_, )  
11 Plaintiff, )

12 v. )

13 \_\_\_\_\_ )

14 \_\_\_\_\_ )  
15 Defendants. )

Case No. \_\_\_\_\_

**NOTICE OF INTENT TO  
PROCEED WITH MEDIATION**

16 This case may be referred to the District of Nevada's early inmate mediation program. The  
17 purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by  
18 which the parties meet with an impartial court-appointed mediator in an effort to bring about an  
19 expedient resolution that is satisfactory to all parties.

20 1. Do you wish to proceed to early mediation in this case? \_\_\_\_ Yes \_\_\_\_ No

21 2. If no, please state the reason(s) you do not wish to proceed with mediation? \_\_\_\_\_  
22 \_\_\_\_\_  
23 \_\_\_\_\_

24 3. List any and all cases, including the case number, that plaintiff has filed in federal or state court  
25 in the last five years and the nature of each case. (Attach additional pages if needed).  
26 \_\_\_\_\_  
\_\_\_\_\_



- 1 4. List any and all cases, including the case number, that are currently pending or any pending  
2 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

3 \_\_\_\_\_  
4 \_\_\_\_\_  
5 \_\_\_\_\_

- 6 5. Are there any other comments you would like to express to the court about whether this case is  
7 suitable for mediation. You may include a brief statement as to why you believe this case is  
8 suitable for mediation. (Attach additional pages if needed).

9 \_\_\_\_\_  
10 \_\_\_\_\_  
11 \_\_\_\_\_

12 **This form shall be filed with the Clerk of the Court on or before thirty (30) days from the  
date of this order.**

13 Counsel for defendants: By signing this form you are certifying to the court that you have  
14 consulted with a representative of the Nevada Department of Corrections concerning participation in  
mediation.

15  
16 Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

17  
18 \_\_\_\_\_  
19 Signature

20  
21 \_\_\_\_\_  
22 Name of person who prepared or  
23 helped prepare this document  
24  
25  
26